



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 596

GALBAN LOBO CO., S. A., PETITIONER

v.

LEON HENDERSON, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 43-46) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered November 19, 1942 (R. 47). The petition for a writ of certiorari was filed December 19, 1942. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act").

QUESTION PRESENTED

Whether petitioner's grounds for protest arose on March 16, 1942, and the protest was therefore

properly dismissed by the Price Administrator under Section 203 (a) of the Act as not having been filed within sixty days thereafter.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix.

STATEMENT

On February 11, 1942, Revised Price Schedule No. 16—Raw Cane Sugar (R. 33-39) became effective under Section 206 of the Emergency Price Control Act of 1942. The price schedule prescribed a maximum price for raw cane sugars from offshore producing areas landed at Philadelphia, of 3.74 cents per pound "duty paid cost and freight basis" (R. 35-36).

On February 28, petitioner, a Cuban corporation, entered into a contract to sell certain sugar to The American Sugar Refining Company (herein called American) at 2.65 cents per pound F. A. S.¹ Puerto Tarafa, Cuba (R. 19). The contract price was at that time the Cuban equivalent of the maximum price—i. e., 3.74 cents per pound less duty and the current freight rate to Philadelphia (R. 14).

¹ The expression "F. A. S." is the abbreviation for "free alongside," which is understood to mean that the seller will deliver the cargo alongside the boat and that responsibility and cost of transportation thereafter will be borne by the buyer. 1 Williston, *Sales* (2d ed. 1924) p. 620.

On March 12, the War Shipping Administration issued its Rate Order No. 12, effective March 16, which authorized a 22-percent increase, called a surcharge, in the freight rates for transporting raw sugar from Cuba to United States Atlantic and Gulf ports (R. 15).

On March 30, the sugar in question was loaded on the S. S. *Yildum* and was landed in due course at Philadelphia (R. 21, 25).

Allegedly on April 9, American refused ² to pay petitioner more than 3.74 cents per pound, less duty and total freight expense including the 22-percent increase (R. 3).

On April 22, petitioner's New York agent and American jointly addressed a letter to the Office of Price Administration asking whether, without violating Revised Price Schedule No. 16, American could pay petitioner the full contract price for the sugar (R. 21).

On May 4, an assistant general counsel of the Office of Price Administration replied that total freight, including the surcharge, must be employed in computing the maximum price, and that American could not pay the maximum price of 3.74 cents per pound, duty paid cost and freight basis, plus the 22-percent freight increase (R. 23).

On June 1, petitioner filed with the Price Ad-

² This date and the refusal were not mentioned in the protest and appeared for the first time in petitioner's complaint filed with the United States Emergency Court of Appeals.

ministrator a protest against the provisions of Revised Price Schedule No. 16 (R. 11-30).

On July 1 the Administrator found that the grounds for protest arose on or before March 16, and dismissed the protest on the ground that it had not been filed within the period prescribed by Section 203 (a) of the Act (R. 31). A complaint was thereupon filed with the United States Emergency Court of Appeals, praying that the order of dismissal be set aside (R. 1-7). The court dismissed the complaint, holding that petitioner's grounds for protest arose on March 16, more than 60 days prior to the filing of the protest, and consequently that the protest was rightly dismissed by the Price Administrator (R. 43-46).

ARGUMENT

The question presented by this case is narrow and does not call for review by this Court. Both parties are agreed that under Section 203 (a) of the Act a protest against a price schedule may be filed only within sixty days after its effective date or, if based upon grounds arising after its effective date, within sixty days after the new grounds arose.³

³ As indicated in the opinion below, Section 203 (a), construed literally, admits of a more strict rule with respect to protests based upon new grounds arising within the initial sixty-day period following the effective date of a price schedule. This question of construction, however, does not arise here since the Price Administrator concurs in the more liberal construction urged by petitioner, and the court below accepted this construction for the purposes of this case (R. 43).

The only issue is the determination of the date upon which petitioner's grounds for protest arose. If, as found by the Price Administrator and the court below, petitioner's grounds for protest arose on March 16, the protest was not filed within the statutory period and the Administrator's order dismissing the protest was admittedly correct.

Petitioner's main contention is that grounds for protest did not arise until the letter of May 4 re-stated the effect of the price schedule upon the sale in question. It has been conceded by the Price Administrator and decided by the court below that an interpretation by the Office of Price Administration resolving an ambiguous provision of a price schedule or regulation might constitute a new ground for protest. As found by the court below, however, the provisions of Revised Price Schedule No. 16 as applied to the sale to American were in no respect ambiguous. In fixing a maximum price at Philadelphia of 3.74 cents "duty paid cost and freight basis," the price schedule employed terminology universally understood in the commercial world to mean that the total cost to the purchaser, including duty and freight, might not exceed 3.74 cents per pound. The contract price of 2.65 F. A. S. Puerto Tarafa, Cuba, was the highest price permitted under the price schedule at freight rates current when the parties entered into the contract. When freight rates were thereafter increased, the price schedule clearly required that the contract

price be reduced by the amount of the freight increase.

Nor could it have been reasonably supposed that the price schedule could be circumvented and a higher price paid by virtue of the F. A. S. clause of the contract. Revised Price Schedule No. 16 prohibited sale or delivery at prices higher than those specified therein "regardless of the terms of any contract of sale or purchase, or other commitment" (R. 33) and Section 4 (a) of the Act prohibited sale or delivery in violation of any price schedule "regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into."

Petitioner being unable to point to any ambiguity in the price schedule, now urges that provisions in the price schedule requiring reduction of the contract price are unconstitutional. This contention is, however, irrelevant to the issue here presented. The belief that a price regulation may be invalid under the Act or the Constitution will not justify delay in filing a protest. Nor is there basis for petitioner's suggestion that, although a price schedule may validly impair preexisting contracts (Pet. Br. p. 15), a price schedule may not cut across contracts entered into subsequent to its issuance.

Petitioner has further urged that on March 16, the effective date of the freight rate increase, its grounds for protest had not matured because of

the contingency that the **S. S. Yildum** might never arrive and delivery of the sugar might not be made. But this contention cannot aid petitioner's case since the boat arrived and was loaded, and delivery under the contract thereby completed, on March 30, more than 60 days prior to the date the protest was filed. In addition, as was pointed out by the court below, completion of this particular sale to **American** was not relevant to the filing of a protest. Petitioner was engaged in the business of selling Cuban sugar for import into the United States, and the effect of the freight surcharge upon petitioner would have been the same regardless of the arrival of the **S. S. Yildum**.

Petitioner also contends, in the alternative, that new grounds for protest arose when **American** refused to pay petitioner in excess of the maximum price established under the price schedule. Such alleged refusal of **American** was not mentioned in the protest; in such circumstances, it is impossible to contend that under Section 203 (a) the protest was "based solely on" such refusal. Nor could delay in filing a protest be justified by expectation that the purchaser would pay more than the maximum price.

Equally without merit is petitioner's contention that grounds for protest had not matured on March 16 because of the possibility that **Defense Supplies Corporation** might absorb the increase in freight. The possibility of such alternative relief

entirely outside the scope of the Emergency Price Control Act does not excuse delay in utilizing the procedures for relief embodied in the Act. This contention is, in addition, foreclosed by the fact that the date of the alleged refusal of Defense Supplies Corporation to absorb the freight increase was not set forth in the protest and does not otherwise appear in the record.

A substantial part of petitioner's brief (pp. 14-18) is devoted to discussion of the propriety of the maximum price, and has no relevance to the question here presented.

CONCLUSION

The decision below is correct, and does not warrant further review. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DAVID GINSBURG,
General Counsel,
HERBERT C. BROOK,
JOHN O. HONNOLD, Jr.,
Attorneys,
Office of Price Administration.

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